

April 15, 2014

Helen Holmes Peak
City Attorney
City of San Marcos
960 Canterbury Place, Suite 300
Escondido, California 92025-3870

Re: Your Request for Informal Assistance
Our File No. I-14-028

Dear Ms. Holmes Peak:

This letter responds to your request for advice, on behalf of Vice Mayor Rebecca Jones, regarding the provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, nothing in this letter should be construed to evaluate any conduct that has already taken place. Because your questions are general in nature, we are treating your request as one for informal assistance.²

Please note that this advice is based solely on the provisions of the Act. We offer no opinion on the application of other conflict-of-interest laws that may apply such as restrictions on incompatible activities your agency may impose.

QUESTIONS

1. May the Vice Mayor serve as a member of the Advisory Council for the Boys & Girls Club of San Marcos?
2. If the Vice Mayor does serve on the Advisory Council, may the Boys & Girls Club use the Vice Mayor’s name and title on the club’s letterhead?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

3. May the Vice Mayor accept tickets to various club events as a member of the Advisory Council and/or for sponsoring the club?

CONCLUSIONS

1. In itself, serving on the Advisory Council while simultaneously holding public office does not create a potentially disqualifying conflict of interest and is not prohibited under the Act. However, to the extent that the Vice Mayor has an interest in the Boys & Girls Club as enumerated in Section 87103, the Vice Mayor may be disqualified from making, participating in making, or influencing governmental decision with a reasonably foreseeable material financial effect on the club.

2. The Act does not prohibit the Boys & Girls Club from using the Vice Mayor's name and title on the club's letterhead. However, there may be implications under the Act depending on the nature of the letter as analyzed below.

3. Tickets provided to the Vice Mayor for sponsoring the Boys & Girls Club are not gifts and not reportable or disqualifying so long as the same tickets and quantity of tickets provided to the Vice Mayor for sponsoring the Boys & Girls Club are also provided to any other gold level sponsor of the club. Notwithstanding tickets provided as a sponsor of the Boys & Girls Club, tickets provided as a member of the Advisory Council may constitute gifts or income to the Vice Mayor as analyzed below.

FACTS

You are the City Attorney of the City of San Marcos and are requesting assistance on behalf of the City's Vice Mayor who has been invited to serve as a member of the Advisory Council for the Boys & Girls Club of San Marcos, a 501(c)(3) charitable organization. According to the Boys & Girls Club, "the Advisory Council is an auxiliary group of the club that is made up of people who have influence and will use their connections and/or expertise to significantly assist the club in achieving its mission." Advisory Council members are appointed for a term of two years, and there is no limit on the number of years a member may serve. The members of the Advisory Council are called to lend their assistance to the Boys & Girls Club on an "as needed" basis.

In the event that the Vice Mayor does serve on the Advisory Council, the Boys & Girls club would like to add the Vice Mayor's name and title to the club's letterhead. As anticipated the Vice Mayor's name would be listed with all other Advisory Council members and would not be singled out by the manner of display. Additionally, as a member, the Vice Mayor would receive tickets to various events hosted by the club such as the annual golf classic and rotary golf tournaments, auction, youth of the year banquet, awards dinner, and holiday hotcakes breakfast. The Vice Mayor currently receives tickets to the events as a gold level sponsor of the Boys & Girls Club.

ANALYSIS

1. May the Vice Mayor serve as a member of the Advisory Council for the Boys & Girls Club of San Marcos?

The Act's conflict-of-interest provisions prohibit any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the following:

- Any business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b)).
- Any real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- Any source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- Any source of gifts to the official if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- The official's personal finances, including those of the official's immediate family. This is known as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

In itself, serving on the Advisory Council while simultaneously holding public office does not create a potentially disqualifying conflict of interest and is not otherwise prohibited under the Act. However, a disqualifying conflict of interest may occur if the Vice Mayor has an interest in the Boys & Girls Club enumerated in Section 87103 such as an interest in the club as a source of income or gifts.³ If the Vice Mayor needs additional help determining whether an interest in the club disqualifies her from taking part in any particular governmental decision affecting the club, she should seek additional advice describing the governmental decision.

2. If the vice Mayor does serve on the Advisory Council, may the Boys & Girls Club use the Vice Mayor's name and title on the club's letterhead?

³ We note that a nonprofit organization is not a "business entity" under the Act. (Section 82005.)

The Act does not prohibit the Boys & Girls Club from using the Vice Mayor's name and title on the club's letterhead. However, there may be implications under the Act depending on the nature of the letter. For instance, payments for a mailing may constitute contributions to the official if the mailing is made for purposes related to the official's candidacy. (See Section 82015(b)(2)(B).) However, so long as any mailing does not involve issues that may be related to campaigning, it is presumed that payments from a 501(c)(3) nonprofit organization are unrelated to the official's candidacy and, therefore, not contributions. (See Section 82015(b)(2)(B)(ii).)

Additionally, donations made in response to a solicitation letter that includes the Vice Mayor's name and title may constitute reportable behested payments under Section 82015(b)(2)(B)(iii). However, Regulation 18215.3(b) provides:

“ A payment is not ‘made at the behest of’ an elected officer under Section 82015(b)(2)(B)(iii) or a PUC member under Section 82015(b)(3) and is not subject to behested payment reporting if the payment is made in response to a fundraising solicitation from a charitable organization requesting a payment where the solicitation does not feature an elected officer or PUC member.

“(1) For purposes of this regulation, ‘features an elected officer or PUC member’ has the same meaning as found in Regulation 18901(c)(2): ‘Features an elected officer’ means that the item mailed includes the elected officer's photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color.’

“(2) An elected officer or PUC member is also featured in a solicitation if the roster or letterhead listing the governing body contains a majority of elected officers (Section 82015(b)(2)(B)(iii)) or PUC members (Section 82015(b)(3)).”

For the Vice Mayor's purposes, donations in response to a solicitation letter that references the Vice Mayor only in a roster listing of all other members of the advisory council, in the same format and font as the names of other members, are not reportable behested payments so long as the majority of the council does not consist of elected officials.

3. May the Vice Mayor accept tickets to various club events as a member of the Advisory Council and/or for sponsoring the club?

Tickets for Gold Level Sponsors: For tickets provided as a gold level sponsor of the Boys & Girls Club, the Act's definition of “gift” specifically excludes a rebate or discount that “is made in the regular course of business to members of the public without regard to official status.” (Section 82028.) So long as the same tickets and quantity of tickets provided to the Vice Mayor for sponsoring the Boys & Girls Club are also provided to any other gold level sponsor of the club, the tickets are made in the regular course of business and without regard to official status, and are not gifts to the Vice Mayor. Accordingly, the tickets are not subject to

gift limits or reporting and do not count against disqualification thresholds for purposes of the conflict-of-interest provisions.

Tickets Provided to Advisory Council Members: In regard to tickets provided to the Vice Mayor as a volunteer member of the Advisory Council, the determinative question is whether or not the tickets given to the Vice Mayor are considered income or gifts.

For example, if the tickets are given to the Vice Mayor and other advisory council members in consideration for the services the members are providing to the nonprofit, these would be considered income and not gifts. To the extent that tickets are income to the Vice Mayor, the tickets must be reported as income on the Form 700 (Sections 87201 and 87207) if valued at \$500 or more, and may result in a conflict of interest if decisions of the Vice Mayor would have a material financial effect on the nonprofit. (Section 87100 and 87103(c)).

On the other hand, a gift is “any payment that confers a personal benefit on the recipient, *to the extent that consideration of equal or greater value is not received....*” (Section 82028, emphasis added.) A person “who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value. (*Id.*)” To the extent that the tickets are gifts to the Vice Mayor, Regulation 18946.4(b) provides a limited exception to the gift rules for tickets to a fundraising event:

“When the event is a fundraising event for an organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, the organization may provide two tickets or invitations per event to an official that shall be deemed to have no value.”

Under this exception, the Boys & Girls Club can provide the Vice Mayor with two tickets to each fundraising event that will be deemed to have no value. These two tickets need not be reported and are not potentially disqualifying.

However, any additional tickets received by the Vice Mayor as gifts are subject to the \$440 gift limit (Section 89503; Regulation 18940.2), must be reported on the Form 700 if gifts from the nonprofit to the Vice Mayor cumulate to \$50 or more in value (Section 87207), and may result in a conflict of interest if the gifts from the nonprofit to the Vice Mayor aggregate to \$440 or more in value and the decision would have a material financial effect on the nonprofit (Sections 87100, 87103(e); Regulations 18700, 18703.4). (See Regulation 18946.4(a) for the valuation of the tickets to a fundraising event.)⁴

⁴ Regulation 18946.4(b) applies to “fundraising events” for 501(c)(3) organizations, and you have asked that we further clarify the phrase “fundraising events.” While we can generally state that a fundraising event is any event at which the organization intends to raise funds for the organization, you should seek additional advice if you have questions regarding any particular event describing the nature of the event.

Ultimately, the Vice Mayor must determine whether or not she has provided equal or greater consideration for the tickets and treat them consistent with the applicable rules set forth above.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl